UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:	)	Bankr. No. 02-40692
	)	Chapter 12
DALE R. HENNIGS, JR.	)	
Soc. Sec. No. XXX-XX-2183	)	
and	)	
KARLA M. HENNIGS	)	
Soc. Sec. No. XXX-XX-8732	)	
Debtors.	)	
JOHN S. LOVALD, TRUSTEE	)	Adv. No. 04-4015
Plaintiff,	)	
-vs-	)	DECISION RE: DEFENDANT'S
	)	MOTION FOR SUMMARY JUDGMENT
AGA, INC.	)	
d/b/a Alcester Grain	)	
Defendant.	)	

The matter before the Court is the Motion for Summary Judgment filed by Defendant AGA, Inc., and Plaintiff-Trustee John S. Lovald's response thereto. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Decision and accompanying order shall constitute the Court's findings and conclusions under Fed.R.Bankr.P. 7052. As set forth below, Defendant's Motion will be denied.

I.

Dale R. Hennigs, Jr., and Karla Hennigs ("Debtors") filed a Chapter 12 petition on June 24, 2002. Among their secured creditors, Debtors included Ag Services of America, Inc., now known as Rabo Ag Services of America, Inc. ("Rabo") with a fully secured claim of $350,000.00 that is secured by a second mortgage on realty and liens on Debtors' livestock, machinery,

and equipment.

On October 8, 2002, Debtors and Rabo filed a stipulation whereby Debtors were authorized to use $116,300.00 in proceeds from grain held by Rabo as security. Of this $116,300.00, Debtors had already been given $14,823.00. Debtors were to use the balance as follows: not more than $21,300.00 to lease or purchase a "tractor/mower/auger"; not more than $30,000.00 for grain storage fees; and $50,000.00 for 2002 harvest expenses. The stipulation was approved by order entered October 8, 2002.[1]

Correspondence from Rabo to Alcester Grain, formally known as AGA, Inc., dated September 25, 2002, reflected Rabo's release of its lien on $15,000.00 in grain stored with Alcester Grain. Alcester Grain's costs were not mentioned in the letter. This release of collateral to Debtors had not been authorized, at that time, by the Court. That day, Alcester Grain sold some of Debtors' stored corn for $18,144.00. Alcester Grain deducted its expenses[2] related to this grain totaling $3,240.00 before it

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[1] The stipulation followed an earlier cash collateral motion by Debtor so it did not need to be separately noticed for approval. *See* Fed.R.Bankr.P. 4001(d) and Local Bankr. R. 4001-2(c).

[2] Alcester Grain's expenses associated with the grain it stored for Debtors encompassed charges for storing, trucking, or drying the grain. Alcester Grain also deducted from the gross proceeds the required fees for "check off" programs, but those

issued a check to Debtors for $14,823.00.

Correspondence from counsel for Rabo to Alcester Grain dated October 8, 2002, reflected Rabo's release of its lien on $101,300.00 worth of grain. The letter specifically stated that Alcester Grain was authorized to apply up to $30,000 for storage fees. The letter also implied that Alcester Grain could sell additional grain so that Debtors could pay $100,000.00 to Rabo. The next day, Alcester Grain sold some of Debtors' 2001 corn for $101,299.50. Alcester Grain deducted expenses of $29,549.28, and it gave a check to Debtors for $71,300.00. On October 25, 2002, Alcester Grain sold some of Debtors' 2001 soybeans for $109,460.60. It deducted expenses of $9,002.60 and issued a check for $99,955.71 jointly payable to Debtors and Rabo.

Rabo's counsel wrote another letter to Alcester Grain on October 30, 2002. This letter stated Rabo was releasing secured grain worth $22,500.00 to allow Debtors to make a rent payment. Alcester Grain was directed to make a check payable to Marion Rus. That day, Alcester Grain sold some of Debtors' 2001 corn for $29,722.50. It deducted expenses of $7,097.50 and issued a check for $22,500.00 jointly payable to Debtors and Marion Rus.

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fees are not at issue. Thus, the gross crop proceeds less Alcester Grain expenses will not equal the check written since the check-off fees were also deducted from the gross proceeds.

Rabo's counsel wrote two more letters to Alcester Grain on November 27, 2002, and January 21, 2003, authorizing the sale of additional secured grain. Based on this correspondence, Alcester Grain sold some of Debtors' 2002 corn for $24,192.00 on November 29, 2002. It deducted $2,080.00 for expenses, and it issued a check to Lawrence Sonneman for $22,000.00. On January 21, 2003, Alcester Grain sold some of Debtors' 2001 soybeans for $5,146.92. It deducted $522.58 for expenses, and it issued a check to Debtors for $4,600.00.

In early 2003, Debtors and Rabo reached a settlement on Rabo's nondischargeability complaint against Debtors. The parties agreed that $52,680.00 of Rabo's claim was nondischargeable but that Rabo would not pursue the claim unless Debtors defaulted on their Chapter 12 plan payments. Following appropriate notice, the stipulation was approved by order entered March 7, 2003.

Rabo's counsel wrote Alcester Grain on February 4, 2003, while confirmation of Debtors' plan was pending. It authorized Alcester Grain to sell $259,900.00 worth of Debtors' stored grain. On February 5, 2003, Alcester Grain sold some of Debtors' 2001 soybeans and some of Debtors' 2002 soybeans for a

total of $91,413.05. It deducted expenses of $4,730.40 and "accrued finance charges" of $3,324.87 and issued a check to Debtors for $82,941.00. On February 5, 2003, Alcester Grain also sold some of Debtors' 2001 corn for $17,278.00. It deducted $4,005.60 for expenses and issued a check to Debtors for $12,009.20. On February 20, 2003, Alcester Grain sold more of Debtors' 2001 corn and some of Debtors' 2002 corn for $10,750.00. This time, Alcester Grain deducted $3,151.36 for expenses, and it issued checks to Debtors for $7,548.64.

Debtors' plan was confirmed February 21, 2003. It provided that Rabo would be paid under the terms set forth in a February 4, 2003, letter from Rabo's counsel to Debtors' counsel. Neither this letter nor other provisions of the Plan as Confirmed specifically acknowledged or provided for the payment of Alcester Grain's expenses associated with Debtors' stored grain for prior or future crop years.

On February 26, 2003, counsel for Rabo advised Alcester Grain by letter that Debtors were authorized "to make sales of grain stored [with Alcester Grain] in conjunction with the previously agreed and recorded stipulation." Rabo further stated that Alcester Grain could issue checks directly to Debtors and send a copy of the check and a settlement summary to

Rabo. With each corn sale and with one soybean sale, Alcester Grain deducted its expenses. The checks were all written to Debtors, with one exception. These post-confirmation sales in which Alcester Grain deducted expenses were:

SALE DATE	GROSS PROCEEDS	ALCESTER GRAIN'S DEDUCTED EXPENSES	CHECK(S) TO DEBTOR
Feb. 26, 2003	$29,297.35	$4,150.80	$25,007.70
March 6, 2003	64,310.00	8,850.00	55,165.00
March 17,2003	40,896.00	5,568.00	35,136.00
March 25,2003	4,200.00	580.00	3,600.00
March 26,2003	21,000.00	2,900.00	18,000.00
March 31,2003	64,146.50	8,827.50	55,024.75
April 3, 2003	11,220.00	1,112.00	10,057.00
April 24,2003	14,591.09	1,305.67	13,219.09
Oct. 21, 2003	45,474.94	530.35	44,111.44[3]

In sum, between September 25, 2002, and October 21, 2003, Alcester Grain deducted from the grain proceeds expenses totaling $98,385.34.[4] It is undisputed that Rabo received a settlement sheet with each transaction that detailed the expenses that Alcester Grain deducted. It is also undisputed that Alcester Grain was not listed on Debtors' schedules nor specifically included in Debtors' Plan as Confirmed.

On September 30, 2003, Debtors were removed as the debtors-in-possession. Trustee John S. Lovald has since managed the estate.

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[3] This check was written to Commodity Credit Corporation.

[4] This total is taken from page 2 of Exhibit B to David L. Reinschmidt's affidavit in support of Alcester Grain's summary judgment motion.

On April 12, 2004, Trustee Lovald commenced an adversary proceeding against Alcester Grain. Under 11 U.S.C. § 549(a)(2), he sought from Alcester Grain a return of the expenses that Alcester Grain had withheld, without court authorization, from post-petition sales of grain secured by Rabo. Trustee Lovald also had two alternative theories of recovery. Under 11 U.S.C. § 542(a), he sought a turnover of the same funds that Alcester Grain had retained but excluding those the Court or the secured creditor Rabo had authorized Alcester Grain to keep. As his third cause of action, Trustee Lovald alleged that Alcester Grain converted Rabo's collateral by retaining proceeds in excess of the sums to which the parties had agreed.

Alcester Grain timely answered with a general denial. It also affirmatively defended Trustee Lovald's complaint on equitable grounds, and it argued that it had obtained from Rabo a written or verbal release for all costs it paid from the secured grain that was sold.

On December 9, 2004, Alcester Grain moved for summary judgment under two theories. The first was that "the Trustee is estopped from denying that there was consent to the deductions taken by [Alcester Grain] on account of pre-petition services[.]" It argued that Rabo knew it was deducting its pre-

petition expenses[5] from the grain proceeds as the crops were sold and that Rabo was now estopped from now arguing it did not consent to the charges. Alcester Grain then argued that Trustee Lovald's claim in the adversary was really a claim on behalf of Rabo, now that Debtors' plan had failed and Rabo's security had proven to be insufficient, and that Trustee Lovald was therefore also estopped from seeking a return of the expenses that Alcester Grain took.

Alcester Grain's second argument for summary judgment was that its post-petition deductions for expenses qualified as administrative expenses that preserved the estate. It relied on several cases from various jurisdictions where similar expenses were allowed as an administrative expense.

In addition, Alcester Grain closed with an equitable argument. It claimed Debtors and Rabo had failed to appropriately consider Debtors' potential for a successful

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[5] In paragraph 29 of its Statement of Material Undisputed Facts, Alcester Grain sets forth a division of its total expenses into pre and post-petition charges. It stated therein that the figures were provided by Rabo. The Court assumes that all parties agree that this is an essentially correct division of the expenses, though it appears that the check-off expenses need to be excluded and there is a few dollars difference from the total expenses set forth on page 2 of Exhibit B to David L. Reinschmidt's affidavit in support of Alcester Grain's summary judgment motion.

reorganization and that the consequences of that failure should be borne by them, not Alcester Grain as an "innocent third part[y]."

In response to Alcester Grain's Motion for Summary Judgment, Trustee Lovald argued that material facts are in dispute and that Alcester Grain is not entitled to summary judgment as a matter of law. Trustee Lovald acknowledged that Rabo knew about the expenses that Alcester Grain was taking from the crop proceeds, but he contented Rabo had not given its consent for payment of the expenses. He also disputed that Rabo was his "agent" at the time of these grain sales.

Trustee Lovald also challenged Alcester Grain's equitable estoppel argument. He argued that Alcester Grain held no equitable defense against Debtor on the petition date regarding yet-to-occur post-petition transactions. Thus, he contented there was no estoppel against Debtors that transferred from Debtors as the debtors-in-possession to him after the debtors-in-possession were removed. He also argued that equitable estoppel could not be relied upon to frustrate Rabo's perfected security interest in the grain. Trustee Lovald further argued that Rabo's silence regarding the expenses was not sufficient to create equitable estoppel, Alcester Grain was aware of Rabo's

secured interest, and neither he nor Rabo had a duty to inform Alcester Grain of Rabo's security interest in the proceeds.

Trustee Lovald disputed Alcester Grain's claim that the funds Alcester Grain retained constituted an administrative expense. He argued that testimony may show that Debtors had options other than to store its grain with Alcester Grain during the case. He argued that, at a minimum, Alcester Grain would have to file an application for an administrative expense and notice it for objections. He argued, however, that in no event could Alcester Grain transform its claim for pre-petition services into an administrative expense, nor could Alcester Grain usurp Rabo's superior lien position in the crops or their proceeds.

In its reply brief, Alcester Grain again argued that no material facts were in dispute. It also restated its position that Trustee Lovald's claims are subject to Alcester Grain's defense of equitable estoppel and that its post-petition expenses should be treated as administrative expenses.

II.
Summary Judgment.

Summary judgment is appropriate when "there is no genuine issue [of] material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Bankr.P. 7056 and Fed.R.Civ.P. 56(c). An issue of material fact is *genuine* if it has a real basis in the record. *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992)(quotes therein). A genuine issue of fact is *material* if it might affect the outcome of the case. *Id.* (quotes therein).

The matter must be viewed in the light most favorable to the party opposing the motion. *F.D.I.C. v. Bell*, 106 F.3d 258, 263 (8th Cir. 1997); *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1490 (8th Cir. 1992)(quoting therein *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587-88 (1986), and citations therein). Where motive and intent are at issue, disposition of the matter by summary judgment may be more difficult. *Cf. Amerinet*, 972 F.2d at 1490 (citation omitted).

The movant meets his burden if he shows the record does not contain a genuine issue of material fact and he points out that part of the record that bears out his assertion. *Handeen v. LeMaire*, 112 F.3d 1339, 1346 (8th Cir. 1997) (quoting therein

City of Mt. Pleasant v. Associated Electric Coop, 838 F.2d 268, 273 (8th Cir. 1988). No defense to an insufficient showing is required. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 156 (1970)(citation therein); *Handeen*, 112 F.3d at 1346.

If the movant meets his burden, however, the non movant, to defeat the motion, "must advance specific facts to create a genuine issue of material fact for trial." *Bell*, 106 F.3d at 263 (quoting *Rolscreen Co. v. Pella Products of St. Louis, Inc.*, 64 F.3d 1202, 1211 (8th Cir. 1995)). The non movant must do more than show there is some metaphysical doubt; he must show he will be able to put on admissible evidence at trial proving his allegations. *Bell*, 106 F.3d 263 (citing *Kiemele v. Soo Line R.R. Co.*, 93 F.3d 472, 474 (8th Cir. 1996), and *JRT, Inc. v. TCBY System, Inc.*, 52 F.3d 734, 737 (8th Cir. 1995).

The Court agrees with Alcester Grain that there are no genuine issues of material fact. However, as discussed below, Alcester Grain is not entitled to a judgment as a matter of law.

III.
Equitable Estoppel.

Under equitable estoppel, a party is prevented from denying a fact that he has previously asserted to be true if the party to whom the representation was made has relied on that

representation and will be prejudiced if that fact were now repudiated. *Konstantinidis v. Chen*, 626 F.2d 933, 937 (D.C. Cir.1980)(cited in

Total Petroleum, Inc. v. Davis, 822 F.2d 734, 737 (8th Cir. 1987)).

As equitable estoppel is defined in this state,[6] a material fact must have been represented or concealed, the party to whom the representation or concealment was made must have been without knowledge of the real facts, the representations or concealment must have been made with the intention that it should be acted upon, and the party to whom representation or concealment was made must have relied upon it to his prejudice or injury. *Dakota Truck Underwriters v. South Dakota Subsequent Injury Fund*, 689 N.W.2d 196, 204 (S.D. 2004). The burden of proof is

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[6] Though Alcester Grain did not discuss whether federal common law or state law applies regarding its equitable estoppel defense, *see Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 602-04 (9th Cir. 1996)(federal law governs application of judicial estoppel in federal court), it cited South Dakota case law for the doctrine. For the purpose of Alcester Grain's summary judgment motion, this Court has done likewise, though the result may not have been any different if federal common law on equitable estoppel had been relied upon. *See, e.g., Bell v. Fowler*, 99 F.3d 262, 266-69 (8th Cir. 1996)(South Dakota's definition of equitable estoppel -- when asserted against a statue of limitations defense -- is more strenuous than the federal standard).

by clear and convincing evidence. *Id*.

Alcester Grain has failed to show that equitable estoppel bars Trustee Lovald's claim. Trustee Lovald did not make any representations to Alcester Grain or conceal any material facts from them. Trustee Lovald played no role in the bankruptcy case and had no dealings with Alcester Grain until well after the subject post-petition grain sales occurred. Moreover, there is no showing that Rabo was Trustee Lovald's or Debtors' agent when the several post-petition grain sales were made. Accordingly, there is no basis on which this Court may conclude that Trustee Lovald is equitably estopped from recovering from Alcester Grain the expenses that Alcester Grain took from the post-petition grain sale proceeds.

IV.
Administrative Expense Claim.

Pursuant to 11 U.S.C. § 503(b)(1)(A), an entity may recover, as an administrative expense against the bankruptcy estate, "the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case[.]" In determining whether a claim is in fact an actual, necessary cost and expense of preserving the estate, "the court must consider whether (1) the expense arose from a transaction with the estate; and (2)

whether it benefitted the estate in some demonstrable way." *AgriProcessors, Inc. v. Iowa Quality Beef Supply Network, L.L.C. (In re Tama Beef Packing, Inc.)*, 290 B.R. 90, 96 (B.A.P. 8th Cir. 2003)(cites therein).

> [T]he majority implicitly recognizes the principle that § 503(b)(1) is strictly a priority provision. It does not create any liability of the estate to an entity, it only grants priority to liabilities that meet the criteria listed in § 503(b)(1). This is in contrast to the provisions of § 503(b)(2), (3), (4), and (5), which do, in fact, deal with the liabilities of entities other than the estate and, by their terms, create both a liability of the estate and a priority for that liability.
>
> As a result, in order to claim a priority under § 503(b)(1), an entity must first show that there is some sort of liability running to it from the estate. Thus, to qualify for priority status, a debt must be incurred by the debtor in possession or the trustee.
>
> . . . A party who incurs expenses is not entitled to their payment as a § 503(b)(1) administrative expense.

Id. at 100 (Kressel, J., dissenting) (citations omitted).

When considering whether the claim benefitted the estate,

> [t]he claimant must show that *other* unsecured creditors received tangible benefits from the services or goods provided by the claimant. *In re Jack Winter Apparel, Inc.*, 119 B.R. 629, 633 (E.D. Wisc. 1990); *Kinnan & Kinnan Partnership v. Agristor Leasing*, 116 B.R. 162, 166 (D. Neb. 1990); *In re Herrick*, Bankr. No. 184-00041, slip op. at 2 (Bankr. D.S.D. May 9, 1988). Incidental benefit to the estate or extensive participation in the case, standing alone, is not a sufficient base for an administrative [expense] status. *Jack Winter Apparel, Inc.*, 119 B.R. at 633.

> A creditor's efforts undertaken solely to further its own self-interest [are] not compensable. *Id*.

In re Bellman Farms, Inc., 140 B.R. 986, 995 (Bankr. D.S.D. 1991*).* The claimant's burden is by a preponderance of evidence. *Id.*; *In re Bridge Information Systems, Inc.*, 288 B.R. 133, 137-38 (Bankr. E.D. Mo. 2001); and *In re Hanson Industries, Inc.*, 90 B.R. 405, 409 (Bankr. D. Minn. 1988).

The expenses Alcester Grain incurred pre-petition regarding Debtors' stored grain cannot, of course, be an administrative expense because no bankruptcy estate existed at the time those expenses were incurred. Alcester Grain may, however, file an application to have its post-petition expenses deemed an administrative expense claim under § 503(b). That request needs to be made in Debtors' main case, not through this adversary proceeding. The key issue will be whether these post-petition expenses benefitted the bankruptcy estate and are thus entitled to the priority given by § 503(b) and § 1222(a)(1). Though Debtors' Plan as Confirmed apparently has fallen by the wayside in favor of a general liquidation of assets, allowed administrative expenses still must be paid to the extent estate funds are available.

If Alcester Grain's administrative expense claim is not

allowed, it may still hold an unsecured claim[7] or a claim chargeable to Rabo under § 506. The latter is an interesting legal issue in light of the unusual posture of this Chapter 12 case, and it is an issue that the parties ultimately may need to brief.

V.

Whether Alcester Grain must return to the bankruptcy estate expenses that it paid itself through deductions from post-petition grain sales still needs to be sorted out. The focus should be on the pre-petition expenses that were paid post-petition, since there is no possibility these will be allowed as an administrative expense.

It would appear that a straightforward application of 11 U.S.C. § 549 should be considered first. No facts appear in dispute, but neither party has briefed the issue. Consequently, another summary judgment motion (or cross motions) and a round of short briefs regarding the application of § 549 are necessary.

An order denying Alcester Grain's December 9, 2004, summary judgment motion will be entered.

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[7] Though the record is not very clear on this point, it appears that Alcester Grain does not claim any lien interest in Debtors' stored grain to secure its expenses.

So ordered this 30th day of March, 2005.

BY THE COURT:

/s/ Irvin N. Hoyt

Irvin N. Hoyt
Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: /s/ Pat Johnson
Deputy Clerk
(SEAL)